

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC.,)

Employer,)

and)

Case 7-RC-22141)

INTERNATIONAL UNION, UNITED AUTOMOBILE,)
AEROSPACE AND AGRICULTURAL IMPLEMENT)
WORKERS OF AMERICA (UAW), AFL-CIO,)

Petitioner.)

BEVERLY ENTERPRISES-MINNESOTA, INC.,)
d/b/a GOLDEN CREST HEALTHCARE CENTER,)

Employer,)

and)

Case 18-RC-16415)
Case 18-RC-16416)

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC)

Petitioner,)

CROFT METALS, INC.,)

Employer,)

and)

Case 15-RC-8393)

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,)
IRON SHIP BUILDERS, BLACKSMITHS,)
FORGERS AND HELPERS, AFL-CIO,)

Petitioner.)

**BRIEF OF AMICUS CURIAE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 4 IN SUPPORT OF PETITIONERS**

Arthur J. Martin
Christopher N. Grant
Schuchat, Cook & Werner
1221 Locust Street, Second Floor
St. Louis, MO 63103-2364
(314) 621-2626
FAX: (314) 621-2378

Attorneys for IREW Local 4

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION	1
ARGUMENT	3
I. The Board and Courts of Appeals Have Long Held that Employees Like Producers That Work as Part of an Integrated Team Are Not Statutory Supervisors.	3
II. The Board Should Not Interpret Section 2(11) to Deny Organizational Rights to Employees Engaged in Collaborative Efforts.	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<u>Electromation, Inc.</u> , 309 NLRB 990 (1992)	6
<u>General Foods Corp.</u> , 231 NLRB 1232 (1977)	6
<u>Golden West Broadcasters - KTLA</u> , 215 NLRB 760 (1974)	3
<u>Meredith Corp. v. NLRB</u> , 679 F.2d 1332 (10th Cir. 1982)	3
<u>Multimedia KSDK, Inc. v. NLRB</u> , 303 F.3d 896 (8th Cir. 2002)	4
<u>National Broadcasting Co.</u> , 160 NLRB 1440 (1966)	3
<u>NLRB v. KDFW-TV, Inc.</u> , 790 F.2d 1273 (5th Cir. 1986)	3
<u>NLRB v. Kentucky River Community Care</u> , 532 U.S. 706 (2001)	<i>passim</i>
<u>NLRB v. Health Care & Retirement Corp.</u> , 511 U.S. 571 (1994)	6
<u>NLRB v. Yeshiva University</u> , 444 U.S. 672 (1980)	3
<u>Post-Newsweek Stations, Capital Area</u> , 203 NLRB 522 (1973)	3
<u>Post-Newsweek Stations of Florida</u> , 217 NLRB 14 (1975)	3, 4
<u>Westinghouse Broadcasting Co, Inc.</u> , 215 NLRB 123 (1974)	3

STATUTES

29 U.S.C. § 152(5)	6
--------------------------	---

29 U.S.C. § 152(11)	<i>passim</i>
29 U.S.C. § 158(a)(2)	6

OTHER AUTHORITIES

Daniel Altman, <i>Productivity is Up Sharply in Good Sign for Long Term</i> , N.Y. Times, November 8, 2002	8
Edmund Andrews, <i>Productivity Jumps Again as Job Creation Remains Slow</i> , N.Y. Times, August 8, 2003	8
NLRB, Legislative History of Labor Management Relations Act of 1947	7

INTEREST OF THE AMICUS CURIAE

International Brotherhood of Electrical Workers, Local 4 ("Local 4") represents men and women working in the television broadcast industry in and around the St. Louis, Missouri metropolitan area. It represents television producers at three local stations: Channels 2, 4, and 11.

On January 3, 2003, Local 4 filed a petition with Region 14 of the Board to represent producers and assignment editors at KSDK Multimedia, Inc., otherwise known as Channel 5. (Case No. 14-RC- 12419.) At the representation hearing, the Employer argued that both groups of employees were statutory supervisors. On February 20, 2003, the Regional Director issued his Decision and Direction of Election, finding that neither the producers nor the assignment editors were statutory supervisors. The Employer requested review, which the Board granted, though solely with respect to the producers. The case is currently pending before the Board.

INTRODUCTION

The question before the Board is whether certain nurses and leadmen are supervisors within the meaning of Section 2(11) of the Act. 20 U.S.C. 152(11). Local 4 requests that the Board find that they are not.

Local 4's interest in this matter is two-fold: first, to urge the Board to adopt an interpretation of Section 2(11) that will continue to exclude news producers from the definition of supervisor and retain their protection under the Act; and, second, to answer Question 8 posed by the Board in its Invitation to File Briefs, that is "may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?" These two interests are related. For the past 30 years, the Board and

the Courts of Appeals have ruled that producers who work as part of an integrated production team are not statutory supervisors. Given this precedent, which Kentucky River did not address, the Board should not fashion a test in these three cases under which producers could be deemed to be supervisors. This said, the question of whether an employee works as part of an integrated team may be instructive in these three cases. The Board's decisions in the producer cases turn on the distinction of directing tasks versus directing employees, which goes to supervisory function of responsible direction.¹ Employees on work teams, like employees on television production teams, each have their own tasks to perform. They decide together what tasks are necessary to a particular job; but, they do not decide who is going to do a task or otherwise direct each other. Thus, like producers, employees on work teams are not supervisors.

The distinction between directing tasks and directing employees is also important given recent developments in management. More and more employers are jettisoning the traditional hierarchies of the workplace for collaborative models. The Board needs to interpret Section 2(11) in light of this development. Nothing in the language or legislative history of the Act suggests that employees on work teams are unprotected. Further, policy demands the inclusion of these employees. When our country's current economic recovery is dependent upon increases in efficiencies, it would be counter-productive to require employers to use non-bargaining unit personnel to communicate instructions that employees can give themselves.

¹ Because the key issue in deciding whether employees engaged in collaborative efforts are supervisors is whether they responsibly direct one another, Local 4's brief is limited to the definition of "responsibly to direct." It joins in the arguments set forth by the AFL-CIO in its Brief as to meaning of "assign."

ARGUMENT

I. The Board and Courts of Appeals Have Long Held that Employees Like Producers That Work as Part of an Integrated Team Are Not Statutory Supervisors.

The Board and Courts of Appeals have long held that producers who work as part of an integrated production team are not supervisors within the meaning of Section 2(11). NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986) (producers do not function as supervisors but are part of integrated team); Meredith Corp. v. NLRB, 679 F.2d 1332, 1342 (10th Cir. 1982), enforcing, 243 NLRB 323 (1979) (director is merely “one of the gang who gives routine instructions”); Post-Newsweek Stations of Florida, 217 NLRB 14 (1975); Golden West Broadcasters - KTLA, 215 NLRB 760 (1974) (directors are part of an integrated team); Westinghouse Broadcasting Co., Inc., 215 NLRB 123 (1974) (producer/directors are part of an integrated production team and do not function as supervisors); Post-Newsweek Stations, Capital Area, 203 NLRB 522, 523 (1973) (editors and newscasters are “equals involved in separate but sequential functions in the development of a single product”); see also NLRB v. Yeshiva University, 444 U.S. 672, 690 n.30 (1980) (noting that architects and engineers functioning as project captains for work performed by teams of professionals are “employees” despite authority to direct, and citing National Broadcasting Co., 160 NLRB 1440 (1966), dealing with broadcast news writers). In Post-Newsweek Stations of Florida, which involved a group of producer/directors, the Board noted:

Programming at WPLG is essentially a **collaborative effort**, and while a producer/director may have considerable input into such effort his role is far short of exclusive control. Although producer/director Leverenz has considerable freedom of action with regard to his program, . . . in his case, as all others, content is subject to budgetary constraints as well as the necessity to meet the requirements of internal Station policy and external regulations. Likewise, we find no evidence that the producer/director exercise final authority with respect to talent selection, program format,

set alternations, inclusion of new programs or specials in the broadcast schedule, or the scheduling of existing programming. The range of their responsibility is circumscribed as in the cases involving their counterparts of WBZ-TV and WJZ-TV.

Id. at 14 n.3 (emphasis added). While producers direct employees, like cameramen, editors, and anchors, in preparing a show, their responsibility is limited. Each employee on the programming team has their own role. Producers do not tell other employees how to do their jobs. Instead, they discuss ideas with other employees, decide with them which is best, and then coordinate employee activities. Moreover, producers lack exclusive control over the entire effort. They need approval from their executive producer before making any substantial change in programming.

Under the above listed line of cases, the Board has distinguished producers. Because they are involved in a collaborative effort with other employees, they are not supervisors. This distinction is still valid today. The Court in Kentucky River limited its ruling to one kind of "independent judgment." NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). It did not address whether employees engaged in largely collaborative enterprise exercise independent judgment of the type envisaged by the Act. Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 901 (8th Cir. 2002) (Bye, J., dissenting). Furthermore, Justice Scalia noted that the Board could offer a limiting interpretation of the supervisory function of responsible direction "by distinguishing employees who direct the manner of other's performance of discrete tasks from employees who direct other employees." Kentucky River, 532 U.S. at 720. This distinction is quite relevant to what producers do. In co-ordinating cameramen, news reporters, editors, and anchors, producers direct the tasks essential to a broadcast. This said, they do not tell cameramen how to shoot footage or instruct anchors on how to read a story, and, in fact, do not know how to do such things. They also are required

to work within set parameters. If problems arise as to format, or when there is a late breaking story, or when a reporter calls in sick, producers lack final, if any, authority. Executive producers and those supervisors more closely aligned with management, have the final say.

II. The Board Should Not Interpret Section 2(11) to Deny Organizational Rights to Employees Engaged in Collaborative Efforts.

While self-regulating work teams are not a new phenomenon, they are increasingly popular, especially as a means of increasing productivity. The teams take varying forms depending upon the type of industry or jobs to be performed. They share, however, common characteristics, as evident by their very purpose. Typically, management assigns a general task or problem to a group of employees, who then discuss and debate various solutions with each other and reach consensus as to the best. As in television production teams, employees on work teams bring different skills and know-how to a problem. This is the purpose and benefit of such teams. With numerous perspectives, employees are more likely to reach a better solution. Because employees have different perspectives, once consensus is reached, each employee may have a different role or perform a different task in completing the job. Employees work together, but may not be able to do each other's work.

The fact that the Board has relied upon the collaboration model in the past suggests that it applies in other settings. To the extent that the Board has already interpreted the statute in producer cases to cover producers working on programming teams, it should read the Act to cover employees in manufacturing or in the service industry who work on work teams. The Board does not need to re-interpret the statute because it already has interpreted the statute. This said, the Board is always free to

reinterpret the Act in light of industrial realities, and so may interpret it to cover employees on work teams.

In Electromation, Inc., 309 NLRB 990 (1992), which involved employee action committees, the Board noted that it can consider changing industrial realities in interpreting the Act when it is free to change a particular construction of the statute – that is, unless congressional intent to the contrary is absolutely clear or the Supreme Court has decreed that a particular reading of the statute is required. Id. at 992. The Board's interpretation of Section 2(5) and Section 8(a)(2) in Electromation is particularly relevant in this case given the similar characteristics of employee action committees and work teams. 29 U.S.C. §§ 152(5) and 158(a)(2). See, e.g., General Foods Corp., 231 NLRB 1232 (1977) (employer did not violate Section 8(a)(2) when it created work teams for purpose of performing various jobs that must be done in operating facility). In Electromation, the Board looked to the Act's legislative history to determine what kind of activity Congress intended to prohibit when it drafted Section 8(a)(2). The Board noted the Congress defined "labor organization" broadly because it considered company unions to be the greatest obstacle to collective bargaining. By comparison, in the case of supervisors, Congress was not "unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act." NLRB, Legislative History of Labor Management Relations Act of 1947, 410. Congress's concern in drafting Section 2(11), as made more clear below, was in excluding personnel who head a department, not in excluding employees who work together on a task.

Nothing in the plain language of the statute indicates that Congress intended to deny organizational rights to employees on work teams. Section 2(11) is ambiguous.

See NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 579 (1994) (agreeing that the term “responsibly to direct” is “ambiguous, so the Board needs to be given ample room to apply [it] to difference categories of employees.” Further, legislature history shows that Congress was not considering work teams when it added “responsibly to direct” to the definition of supervisor. In explaining his amendment, Senator Flanders stated: “[A supervisor] determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.” NLRB, Legislative History of Labor Management Relations Act of 1947, 1303. Flanders’s vision was of a hierarchical work place, which was the common model in 1947. He saw entry level employees moving up the ranks, learning new skills and taking new jobs along the way, until a promotion to department head where they would now filter and communicate “general orders” to unit employees. The supervisor did not perform any task associated with production, though he could instruct employees on how to do a task because in all likelihood he probably once performed that task. By contrast, employees on work teams may not know how to do each other’s tasks. They cannot train each other. Rather, employees work together in discussing solutions, and work independently on their respective, separate tasks, as set by management.

Because Congress was not thinking of work teams when it drafted Section 2(11), the Board can and should interpret the language in a fresh way. The key is to interpret it in a way that accommodates Congress’s intent – that is, to include “minor supervisor employees” under the protection of the Act. The best way is to read “responsibly to direct” to not cover employees on teams instructing one another in the performance of

pre-defined and individual tasks. While these employees technically direct tasks, they do so within parameters set by management. Team members bounce ideas off one another, expecting feedback, but do not go outside the assignment itself. The team is also limited by budget, scheduling, format, and so on, which supervisors determine and which employees cannot change on their own. Finally, employees on teams only perform the tasks that they can perform. A television producer does not ask a cameraman to read a story on air just as a registered nurse does not ask a mental health worker to serve as an emergency room technician. In fact, given that employees on work teams struggle for consensus in making a decision and given that employees on teams direct each other, were the Board to interpret Section 2(11) to include directing tasks, then any employee on a team could be deemed a supervisor. This would, essentially, nullify the Act in workplaces with work teams. It would make almost all such employees supervisors.

Policy also mandates coverage of employees on work teams. The country is currently going through a "jobless recovery." While productivity rates are increasing, unemployment remains stagnant. Edmund Andrews, *Productivity Jumps Again as Job Creation Remains Slow*, N.Y. Times, August 8, 2003, at C1. While this may be partly due to improvements in technology, the driving reason is structural change. Employers are increasing internal efficiencies. They are looking at better, not bigger. Daniel Altman, *Productivity is Up Sharply in Good Sign for Long Term*, N.Y. Times, November 8, 2002, at C1. Work teams are, of course, a kind of structural change. In allowing employees to direct themselves, management can remove extra levels of supervision and thus save money. Employers no longer need a mid-level boss to communicate management instructions. Work teams may also lead to faster decisions. Suggestions

and instructions do not need to travel up and down a hierarchy, but can be implemented immediately. This leads to improved efficiency. Finally, work teams lead to better decisions. Employees on the front lines know their jobs best. They have the solutions to everyday problems on hand. This not only helps management, but also improves over-all morale in the workplace.


CONCLUSION

The Board has long held that producers who work on integrated teams are not supervisors. Moreover, these cases are instructive in re-interpreting the Act. Given Congress's intent to include minor supervisory employees and new developments in management strategies, the Board should not read Section 2(11) to cover employees on work teams and deny such employees their organizational rights.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

Attorneys for IBEW, Local 4

A handwritten signature in black ink, appearing to read 'C. N. Grant', is written over a horizontal line.

Christopher N. Grant

Arthur J. Martin

1221 Locust Street, Second Floor

St. Louis, MO 63103-2364

(314) 621-2626

FAX: 314-621-2378

CERTIFICATE OF SERVICE

The foregoing Brief of Amicus Curiae International Brotherhood of Electrical Workers, Local 4 in Support of Petitioners was served by mailing same, postage prepaid, on the 18th day of September, 2003 to:

Paul Whitehead
Daniel M. Kovalik
United Steelworkers of America
Five Gateway Center, Suite 807
Pittsburgh, PA 15222

Michael T. Manley
Blake & Uhlig
753 State Ave., Suite 475
Kansas City, KS 66101

Penelope J. Phillips
Frederick W. Vogt
Felhaber, Larson, Fenlon & Vogt, P.A.
601 Second Ave. South, Suite 4200
Minneapolis, MN 55402-4302

Daniel W. Sherrick
Blair Simmons
UAW, International Union
8000 East Jefferson Avenue
Detroit, MI 48214-2699

William M. Thacker
Claire S. Harrison
Dykema Gossett PLLC
315 E. Eisenhower Parkway, Suite 100
Ann Arbor, MI 48108

Norman Mott
Shields, Mott, Lund, LLP
650 Poydras St.
New Orleans, LA 70130



Arthur J. Martin